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JAMES H. McKENN

No. 517.

Brf. of Ingersoll Logan & Dem

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for P. E. Con ano.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

Logan

JOHN H. ~~TYSON~~, as Administrator with the Will annexed of ANDREW J. DAVIS, Deceased,

Plaintiff in Error,

agst.

ANDREW J. DAVIS, Jr., and the FIRST NATIONAL BANK OF BUTTE.

In Error to the SUPREME COURT of the STATE OF MONTANA.

Logan

Brief by Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

ROBERT G. INGERSOLL,
WALTER S. LOGAN,
CHARLES M. DEMOND,
HENRY A. ROSE,
Attorneys and of Counsel for
Plaintiff in Error.

IN THE

Supreme Court of the United States,

October Term, 1897.

JOHN H. LEYSON as Administrater with the Will annexed of ANDREW J. DAVIS, deceased,
Plaintiff in Error,

against

ANDREW J. DAVIS JR., and THE FIRST NATIONAL BANK, OF BUTTE,
Defendants in Error.

No. 517.

IN ERROR TO THE SUPREME COURT, OF THE STATE OF MONTANA.

Brief of the plaintiff in Error, in opposition to motion of Andrew J. Davis, Jr., to dismiss the Writ of Error herein, or to affirm the judgment below.

This action was commenced December 20, 1893, by James A. Talbott, as special adminstrator of

the estate of Andrew J. Davis, deceased, in the District Court of Montana, and was continued by order in the name of his successor, Leyson, the plaintiff in error here, as administrator with the Will annexed. (Record, 145.)

The Writ of Error was taken out on behalf of Jon H. Leyson, the plaintiff below, to review the judgment of the Supreme Court of Montana, which adjudged that Andrew J. Davis, Jr., defendant in error, was the owner of 950 shares of the capital stock of The First National Bank of Butte, a national bank, and which directed the bank to transfer the shares to him. In the course of the trial below, a federal question was specifically raised on numerous occasions and the decision was against the right claimed under the federal laws, both in the District Court and in the Supreme Court, of Montana, on appeal, as will hereafter appear.

The brief for the defendant in error on this motion contains a statement of the case on pages 4 to 8 inclusive of the brief, and counsel for defendant in error say that such statement is a copy of the one made "for the administrator before the Supreme Court, of Montana, in the voluminous brief there filed."

Counsel for defendant in error again in their brief, at page 26, refer to alleged statements made in the brief for the administrator before the Supreme Court, of Montana.

It is needless to say that the brief filed by the administrator in the lower Court is not in any way a part of the record in this Court, and we submit that any reference to it or alleged extracts from it are improper.

Brief statement of the case.

The complaint below (record, page 5) alleges that one Andrew J. Davis, deceased, when he died, left, among other property, 950 shares of the capital stock of the said bank which stood in his name on the books of the bank, and which had never been indorsed, transferred or conveyed by the decedent; that the defendant, Andrew J. Davis, Jr., had the certificates and claimed title to them, and the judgment asked is that the defendant, Andrew J. Davis, Jr., be decreed to deliver the stock to the administrator, that his claims be adjudged void and that the bank transfer the stock to the administrator.

The answer of the defendant Davis sets up a claim to these shares of stock under an alleged gift *causa mortis* (Record, page 8.)

The findings of the trial court adjudge that the decedent gave this stock to the defendant, Andrew J. Davis, Jr., while ill, and that the decedent died of the same disease with which he suffered when he gave the stock, and that the certificates were delivered by him to the defendant (Record, page 82.)

The Court, however, finds in the eighth finding as follows:

> "The Court further finds as facts:
> That there was no written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the gift; that there was no written authority executed by the donor of any kind, empowering the defendant, Andrew J. Davis, or any other person for him to transfer said stocks or certificates of stock upon the books of the bank during the lifetime of the donor, and that there was no transfer of the stock or the certificates thereof to the defendant, Andrew J.

Davis, upon the books of the bank during the lifetime of the donor or ever or at all." (Record, pages 82 and 83.)

The Court concludes that the gift was a gift *causa mortis* (page 83), and makes the following conclusions of law:

"Conclusions of Law.

I

That the defendant, Andrew J. Davis, is the owner of the stock and shares and certificates thereof of the First National Bank of Butte, which are described in the complaint herein, and is entitled to have said shares and stock transferred to him on the books of said bank, and to have new certificates issued to him therefore, and that said donor was divested of his possession, dominion, and control of said shares of stock by said gift.

II.

That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate, any right, title, or claim, in or to the shares of stock and the certificates thereof described in the complaint or any part thereof.

III.

That the defendant, Andrew J. Davis, is entitled to a decree herein in accordance with the prayer of this answer, and such decree is hereby ordered entered." (Record, pages 83 and 84.)

The Court in its judgment repeats the findings of fact and conclusions of law, and (Record, page 87,) adjudges that the defendant is the owner of the stock and that "plaintiff, as special administrator of said estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate, any

right, title or claim to said shares of stock or the certificates thereof or any part thereof."

It is further adjudged that the bank make a transfer of the certificates and deliver new certificates to the defendant (Record, page 87).

The judgment of the lower Court was affirmed by the Supreme Court of Montana by judgment of November 25th, 1895, (Record, page 145.) The writ of error was allowed by Mr. Justice Brewer and sued out on the 29th day of October, 1897, (Record, page 1,) and filed in the Clerk's Office of the Supreme Court of Montana, November 4, 1897, (Record, page 2.)

Argument.

The questions discussed in this brief will be presented as follows:

1. A federal question was raised by the record in a proper and sufficient way.

2. A federal question did properly arise in the cause.

3. The decision of the Supreme Court of Montana did not rest upon any ground sufficiently broad to maintain its decree, other than the federal question so raised.

Point I.

A federal question was raised by the record in a proper and sufficient way.

It appears from the record that the stock in question was never transferred in the lifetime of

the decendent to the defendant on the books of the bank; that the decendent did not indorse the stock or sign any power of attorney or other instrument transferring the title; and that the transaction was not a sale or a pledge for value.

These facts raise a question which has never been decided by this court, namely, whether any title, legal or equitable, passed to the defendant under these circumstances.

The federal statute, Section 5139, U. S. R. S., provides,—

> "The Capital Stock of each association shall be divided into shares of one hundred dollars each and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or article of association."

The by-laws of the defendant bank, No. 21 (Record, page 74), provide that the stock shall be "assignable and transferable only on the books of this bank subject to the restrictions and provisions of the banking laws and transfer book shall be provided in which all assignments and transfers of stock shall be made." (Record, page 74.)

The record shows, and the complaint avers (Record, page 5) that the stock certificates contain this provision,—"transferable only by him or his attorney on the books of this bank on the surrender of this certificate." (See By-law 23, Record, page 74.)

The point that such a transaction as the record shows was contrary to the above provision of the revised statutes was specifically taken in the court below.

At the trial, the plaintiff made the following requests for findings of fact.

> "1. Was there any written assignment of said stock or certificates of stock or power of attorney executed by the donor in connection with the alleged gift?
>
> 2. Was there any written authority executed by the donor of any kind empowering the defendant Andrew J. Davis, or any other person, for him, to *perform* said stock certificates of stock upon the books of the bank during the lifetime of the donor?
>
> 3. Was there any transfer, with or without such authority, of said stock or the certificates thereof to the defendant Andrew J. Davis upon the books of said bank during the lifetime of the donor?" (See Record, page 79.)

Plaintiff made the following requests to find conclusions of law:

> "1. That the said alleged donee did not become a *shareholder* by said alleged gift under *the statutes of the United States and by-laws of the bank made in pursuance hereof.*
>
> 2. That the said alleged donee did not succeed to the rights and liabilities of the deceased under said statutes and by-laws.
>
> 3. That said donor was not divested of his possession, dominion, and control of said stock under said statutes and by-laws or otherwise.
>
> * * * *
>
> 6. That the legal title and control and dor nion over said stock remaining in the alleged donor at the time of his death, the same vested in the plaintiff as administrator, under the statutes of the United States, who now holds and possesses the same." (See Record, pages 79 and 80).

Also, plaintiff made the following motion for judgment:

"2.

Because, if the same is insufficient otherwise to authorize a *transfer* of said certificates of stock or to make said defendant, Davis, a *shareholder* in said bank, it is utterly insufficient under the *statutes of the United States applicable thereto.*

3.

Because, the laws of the United States applicable thereto said defendant, Davis, has neither the legal title or beneficial interest in the shares of stock of said defendant, First National Bank of Butte, and because the plaintiff herein claimed the right thereto under said statutes.

4.

Because, the rights of the plaintiff and defendant, Andrew J. Davis, as well as to dates and obligations of defendant bank, arise under the laws of the United States.

5.

Because, the *manner of becoming*, and rights and liabilities of shareholders are involved, which are created by and arise under the *laws of the United States*, and must be determined by the interpretation thereof." (See Record, pages 80 and 81).

All of these requests and motions were refused and the motion for judgment was overruled, and plaintiff duly excepted. (See Record, page 81).

Notwithstanding these requests and this motion, the Court found and adjudged that the title to the stock was in the defendant and not in the administrator, and specifically found (Record, page 84):

"That the plaintiff herein, as special administrator of the estate of Andrew J. Davis, deceased, or otherwise, has not, nor has said estate, any right, title or claim in or to the shares of stock and the certificates thereof described in the complaint or any part thereof."

To the judgment as rendered and to the findings as made and to the Court's refusal to find as requested, the plaintiff duly excepted (Record, pages 87 and 88.)

Furthermore, the plaintiff gave notice of a motion for a new trial (Record, page 88) and subsequently filed the grounds of the motion for a new trial and specifically raised this federal question in various sub-divisions of the second ground of the motion as follows:

"*a.* The evidence fails to show that there *was* any written assignments of said certificates of stock.

"*b.* It fails to show that there was any power of attorney or instrument in writing executed in connection with the alleged gift authorizing the transfer or assignment of said stock or the transfer thereof on the books of the defendant bank.

c. It does not show that the legal title to said certificates of stock was ever transferred or assigned to the alleged donee thereof.

e. It does not show that said donee ever became a stockholder in said bank.

f. It does not show that said alleged gift was ever perfected or that said alleged *said* donee was ever subjected to the liabilities or entitled to the dividends or benefits of said alleged gift by becoming a shareholder or stockholder in said bank or otherwise.

i. The evidence shows that said alleged donee required no rights as a shareholder or stockholder in said bank, and that he was not subjected to any liabilities on account thereof as provided by the acts of Congress in that behalf or by the by-laws of said bank.

k. It shows that said alleged donee never acquired possession, dominion or control of said stock during the lifetime of said deceased and that he could not—so under the said laws of the United States or by the by-laws of said bank, made for the protection of the public and those dealing with said bank.

q. The evidence only shows an intention to

make a gift, and that no pretended gift was made or attempted to be made except that claimed to have been made at the writing desk, at the alleged donee's residence, in the presence of plaintiff and the alleged donee and donor, on the 27th or 28th day of December, 1889, which failed to show any assignment of said stock or the certificates thereof, or any power of attorney authorizing the same, or any transfer or authority to transfer the same upon the books of the bank, and it expressly shows said alleged gift to be conditional, imperfect, and invalid, and that it was made, if made at all, according to the testimony of the only witness to said alleged gift, to depend upon an accident or something happening to him on his said trip to Tacoma or his failure to return, and that said alleged gift was on account thereof invalid.

u. Because the evidence without any conflict therein refers to the alleged gift on the 27th or 28th day of December, 1889; that it was made in contemplation of a trip from Butte, Montana, to Tacoma, Washington, and was expressly without consideration in these words: 'If I don't come back or anything happens, I want you to have that stock,' and does not constitute a gift at common law, in force in this State, and could not be such under the statutes of the United States *applicable to the transfer of stock in national banks.*

w. It does not show that said alleged donee exercised any possession, dominion, or control of said stock during the lifetime of the donee; that he ever received any dividends or benefits thereof or was authorized to receive any, or that under the alleged gift he was ever admitted or registered as a stockholder or a shareholder or entitled to be, or that he was ever subjected to any liabilities as a stockholder under the Laws of the United States or otherwise, or that he ever voted said stock or controlled the voting thereof with the knowledge or consent of the alleged donors." (See Record, pages 90, 91 and 92.)

Furthermore, in sub-division III of this motion

(see Record, page 92) this same federal question was raised specifically in various separate subdivisions of the motion as follows:

"*i*. In not finding upon all of the special findings requested by plaintiff.

j. In not finding in each or any separately and severally of the special findings so requested.

k. By making the findings it did make in said cause.

l. In overruling plaintiff's motion for judgment and in rendering a decree for defendant Davis.

p. In that said decree is in violation of the Laws of the United States and by-laws of the bank.

r. The Court has no jurisdiction by said decree under the Laws of the United States to make said defendant Davis, a *shareholder* in said bank.

t. The Court erred in not entertaining or passing upon the federal question involved, and in not pursuing the rules of the common law adopted by statute in this State requiring the assignment of said stock to be in." (See Record, page 93.)

Notwithstanding these specific grounds of the motion, the trial court (Record, page 103) overruled the motion for a new trial to which the plaintiff duly excepted.

The plaintiff appealed to the Supreme Court of Montana from this judgment, and the whole thereof, and from the order denying his motion for a new trial (Record, page 104).

The judgment of the Court below was affirmed and the Supreme Court of Montana, in its opinion, distinctly discussed this federal question and held that upon the state of facts disclosed by the record title passed to the defendant notwithstanding the provisions of the said federal statute and

the by-laws of the bank. In discussing this federal question, the Supreme Court of Montana were not in any doubt as to its nature. The language of the Court in discussing the federal question was as follows:

> "The court is asked to pass upon the 'Federal question' involved in this case. To us it appears, however, that the main point involved is whether there has been a valid gift *causa mortis*. It being clear to us that the equitable title to the stock passed by the delivery of the certificates, no decision has been made upon that point other than by the common law generally, for we do not think the statutes of the United States attempt to regulate the transfer of such an equitable title; but if there is a Federal question involved, it is this: Can an interest in the shares of a national bank be legally transferred by the owner thereof to a donee, as a gift *causa mortis*, so as to confer the equitable title upon the donee, without a written transfer of the shares on the books of the bank or an indorsement on the back of the certificates themselves? We answer that question affirmatively, in the light of the decisions of the Supreme Court of the United States, that a transfer on the books of a national bank is not necessary to give to a donee an equitable title to the shares. National Bank v. Watsontown Bank, 105 U. S., 220; Bank v. Lanier, 11 Wall., 378; Johnston v Laflin, 103 U. S., 804; Black v. Zackarie, 3 How., 513. Judge Brewer, as circuit judge, held in Kansas v Bradley, 26 Fed., 289, that a proposition once decided by the Supreme Court of the United States is no longer to be treated as a Federal question. Nor do questions which involve the ownership of national bank shares always present Federal questions. Williams v. Weaver, 100 U. S., 547; Le Sassier v. Kennedy, 123 U. S., 521." (See Record, pages 142 and 143.)

It is evident that this Federal question was clearly and specifically raised. The various requests as specifications of the motions show that

objection was made to the title of Andrew J. Davis, Jr., and a claim of title was made on the part of the administrator by virtue of the laws of the United States regulating the *transfer* of national bank stock and the by-laws of the bank made in pursuance thereof. This may not appear in all of the requests or specifications, but from them all together there can be no doubt that reference was made to a specific section of the national banking act on the subject of transfers and the only sub-division regulating this matter is sub-division 5139 of the United States Revised Statutes. It clearly appears that reference was made to a specific statute, a specific portion of the national banking act, although it was not mentioned by number. There could be no ambiguity. Reference was not made to all of the laws of the United States nor was reference made to all of the national banking act. The reference to the Federal Statute was made so specifically that this Court can readily understand, as did the Supreme Court of Montana, that the statute relied on was that part of the national banking act referring to the *transfer of stock*.

The authorities clearly support the view that the Federal question was sufficiently raised.

In *Lawler v. Walker*, 14 How., 150, this Court, in speaking of the manner in which a Federal question must appear, says:

> "It must appear in the pleadings of the suit or from the evidence in the course of the trial, in the instructions asked for or from exceptions taken to the ruling of the Court."

In *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116, the Court says:

> "Now, although there are decisions in which it is said that the point raised must appear on the record and that the particular Act of Congress or part of the Constitution supposed to

> be infringed by the State law ought to be pointed out, it has never been held that this should be done in express words but the true and rational rule is that the Court must be able to see clearly from the whole record that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ and that the right thus claimed by him was denied."

The writ in this case was held good although no certain provision of the Constitution was referred to specifically and the objection below was only that the obligation of a contract would be impaired. The Court held that this general objection sufficiently pointed out the precise provision of the Constitution relied on.

In *Crowell v. Randall*, 10 Peters, 368, the Court said:

> "That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms *ipsissimis verbis* but that, it is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment."

In *Armstrong v. Athens Co.*, 16 Peters, 281, the Court held that it may appear that the point was raised either in the Appellate Court below or it may appear "from the record that the question was necessarily involved in the decision and that the State Court could not have given the judgment or decree which they passed without deciding it."

In *Murray v. Charleston*, 96 U. S., 441, the Court says:

> "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State

Court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State Court when the determination or judgment of that Court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In *Crowell v. Randall*, (10 Pet., 368), it was laid down, after a review of almost all our previous decisions, 'that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment.' This case was followed by *Armstrong et al. v. The Treasurer of Athens County* (16 id., 281), where it was held sufficient to give this Court jurisdiction if it appear from the record of the State Court that the Federal question was necessarily involved in the decision, and that the Court could not have given the judgment or decree which they passed without deciding it. See also *Bridge Proprietors v. The Hoboken Company*, 1 Wall., 116, and *Furman v Nichol*, 8 id., 44."

In fact, no mention of the Federal question need be made in the decision or opinion of the Appellate Court below.

In *Arrowsmith v. Harmoning*, 118 U. S., 194, it appeared that the Federal question was raised in the Appellate Court below by an assignment of error, but was not passed on or mentioned in its opinion. This Court said, however:

> "The decision, however, necessarily involved a denial of the right which was claimed in this way,"

and this Court held it had jurisdiction.

Oxley Co. v. Butler Co., 166 U. S., page 660. This Court said that where the claim of a Federal question is not clear, "*yet, if it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity and denied the claim so asserted, our jurisdiction could be sustained.*"

Not only did the Supreme Court of Montana consider the Federal question, not only was it raised at the trial, but also was specifically set up on the motion for a new trial, and under such circumstances this Court has held that this is a sufficient way of raising the question even if it had not been raised at all in any other way. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S., 226. The Court said on this subject as follows:

> "It is sufficient if it appears from the record that such right was specially set up or claimed in the State Court in such manner as to bring it to the attention of that Court.
>
> Now the right in question was distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial. Among the grounds for a new trial were the following: That the several rulings of the Court in excluding proper evidence for the defendant, the statute under which the proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the fourteenth amendment declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its limits the equal protection of the laws.
>
> When the trial Court overruled the motion

for a new trial and entered judgment it necessarily held adversely to these claims of Federal right.

But this is not all. In the assignment of errors filed by the defendant in the Supreme Court of Illinois, these claims of rights under the constitution of the United States were distinctly reasserted.

It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the constitution of the United States But that circumstance is not conclusive against the jurisdiction of this Court to re-examine the final judgment of the State Court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule,' this Court said in *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116, 143, 'is that the Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In *Roby v. Colehour*, 146 U. S., 153, 159, it was said that 'our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' *De Saussure v. Gaillard*, 127 U. S., 216, 234; *Brown v. Atwell*, 92 U. S., 327; *Chicago Life Ins. Co. v. Needles*, 113 U. S., 574, 577; *Sayward v. Denny*, 158 U. S., 180, 183. There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted

> by the defendant under the National Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits."

In *California Bank v. Kennedy*, 167 U. S., 362, in determining whether the Federal question was properly raised in the Court below, this Court said, in a case involving the National Bank Laws:

> "But if there were ambiguity on this subject, it is entirely removed by the grounds which were presented on a motion for a new trial and the specifications of error which formed the basis of the appeal which was taken to the Supreme Court of the State of California, for in both the motion and specifications the want of power under the laws of the United States was clearly asserted."

Furthermore, the Statute of Montana, Code of Civil Procedure, Section 17, provides that in the determination of causes all decisions of the Supreme Court must be given in writing and the grounds of the decision must be stated.

This Court, therefore, has a right to, and should, look at the opinion of the Supreme Court of Montana.

In *Dibble v. Bellingham*, 163 U. S., 69, the statute of the State of Washington contained a similar provision and this Court said:

> "It is the settled course of decision that this Court may examine opinions so delivered and recorded to ascertain the ground of the judgment of the State Court, citing *Kreiger v. Shelby*, 125 U. S., 39, 44.

There can be no objection that the trial below was really upon the counterclaim of the defendant,

Andrew J. Davis, and the judgment of the Court below was for a defendant as against a plaintiff.

In *Shively v. Bowlby*, 152 U. S., 1, 9, it appeared that there had been an adjudication on matters set up by a counterclaim which involved a Federal question and the case was removed by a writ of error to this Court. The opinion here stated,—

> "This jurisdiction has been repeatedly exercised without objection or doubt in similar cases of writs of error to State Courts," citing *Railroad Co. v. Schurmeir*, 7 Wall., 272; *Packer v. Bird*, 137 U. S., 661; *Knight v. U. S. Land Association*, 142 U. S., 161.

If the question was raised, it cannot be urged on this motion that it was improperly decided by the Court below. *Furman v. Nichol*, 8 Wall., 44.

If a Federal question was raised, it must be considered, even though a frivolous one. The writ cannot be dismissed. *Hall v. Jordan*, 15 Wall., 395.

The rule regulating this subject is well laid down in *Murdock v. Memphis*, 20 Wall., 636, where the matter was exhaustively considered. The Court said,—

> "Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:
>
> 1. That it is essential to the jurisdiction of this Court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State Court.
>
> 2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case.
>
> 3. That the decision must have been against the right claimed or asserted by plaintiff in error under the constitution, treaties, laws, or authority of the United States.

4. These things appearing, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that Court without regard to the Federal question, then this Court will reverse the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that Court, as the circumstances of the case may require."

There can be no doubt, in view of these authorities, that the question was properly raised and specifically raised in the Court below. The whole record shows that reference was made to *that part* of the *national banking law* which refers to *transfers of stock*. This was a *certain, definite* part of the statute and in fact the Supreme Court of Montana, in its opinion, discussed this very provision. This Court, therefore, in view of its previous decisions, has jurisdiction if the question raised was, as we contend, a Federal one necessarily involving the whole case.

Point II.

A Federal question did properly arise in the cause.

The determination of this case involves questions which have never before been presented to this Court. The record discloses simply that the decedent handed over certificates of stock to the defendant as a gift without any written indorsement or power of attorney or other instrument transferring title, and that the stock was never transferred on the books of the bank. Cases have been decided by this Court upholding an equitable title where there had been no transfer on the books but in all such cases it appeared that the transaction represented a sale or pledge for value and that the stock was indorsed or transferred by a written power of attorney or other writing, but no case where the facts were the same as in the present case has as yet arisen.

In considering this point, it is well to note the decisions of this Court construing the National Banking Laws.

In *Davis v. Elmira Savings Bank*, 161 U. S., 275, 283, the Court says:

> "National Banks are intrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties, for the performance of

> which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this Court."

See also *McCormick v. Market Bank*, 165 U. S., 538. This case held that a lease executed by a national bank before it was authorized to do business by the Comptroller was absolutely void, this being in conflict with the Statutes of the United States.

In *Pauly v. The State Loan & Trust Company*, 165 U. S., 606, the rules of law regulating the duties and responsibilities of shareholders of national banks are very fully elaborated. The decision shows clearly that the laws of the United States are for the protection of creditors of national banks; that the real shareholder cannot absolve himself from responsibility by collusive or fraudulent or insufficient transfers. The Court will look at the real transaction and determine whether under the Statutes it was a sufficient one. The ownership of stock cannot hang in the air. It must be definitely in the transferor or transferee, and the stockbooks are for the purpose of enabling creditors and others interested to determine who are the persons liable for debts. There can be no doubt that under this case the estate of Andrew J. Davis would be held to be the real stockholder upon the facts shown in this record were any question to arise concerning the responsibity of stockholders for debts. The question then, as now, would be, Did the title pass or did it remain in the donor?

In a very recent case in this Court, *California Bank v. Kennedy*, 167 U. S., 362, it appeared that a national bank was stockholder in a State savings bank and the point was made that under the National Banking Act the national bank could not be

made liable under a statute of the State in case of insolvency of the savings bank. The State Court had held the national bank liable. This Court held that the statute prohibited such ownership and that, therefore, the national bank could not be made liable under any circumstances because of the provisions of the Revised Statutes of the United States.

It is apparent from these authorities that national banks stand on a different footing from other corporations; that where a state statute or decision or the acts of a person conflict with the national banking laws, *or are inconsistent with the general scheme and scope of those laws*, the national statute is paramount.

Waite v. Dowley, 94 U. S., 533. This Court held that state statutes in regard to national banks may be valid with this important exception as stated by the Court:

> "Except when such legislation is in conflict with some act of Congress or when it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States or interferes with the purpose of their creation."

We have already referred to Section 5139 of the national banking act and the by-laws of the bank made in pursuance thereof and to that part of the Court's finding which held that this stock had never been transferred on the books of the bank, was not indorsed or transferred by any written instrument, and which likewise found that the transaction was a gift and not a sale.

If the present case were one where the only requisite which had not been observed was the transfer on the books and if it had appeared that the transaction represented

a sale or pledge for value, and that there had been a written indorsement on the stock or a transfer by some written instrument, we should not have raised this Federal question, nor would we have taken out this writ of error. It has been held by this Court that in cases of sale for value where the stock has been delivered with a proper indorsement or power of attorney, or other written instrument transferring title that in such cases as between the parties the equitable title would pass and that the Courts may then decree a transfer. Thus far has the rule been relaxed, but no further. It is doubtless true that Section 5139 of the Revised Statutes is primarily for the protection of the bank and other stockholders, and in the interest of creditors. It is provided by U. S. R. S., Section 5139, that "every person becoming a shareholder by such transfer, (the transfer on the books) shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

In Section 5151 of the United States Revised Statutes, the liability of shareholders of National banks is fixed.

The theory of these statutes and of the National banking system generally, is to so regulate transfers of National banking stock that the bank and creditors shall be fully protected. United States laws on this subject are paramount. They have been relaxed, as above stated, in cases of actual sales for value where no transfer has been made on the books, but where the stock has been indorsed with a power of attorney to transfer it, or where some separate written instrument has been given of this character. No great danger could arise to

he bank or its creditors under such circumstance s
ecause there would always be some written evi-
lence of the actual fact of the transaction and t e
tockholders could always be readily ascertained
r held to their liabilities.

But to go further and hold that without any
vritten indorsement, power of attorney or other
nstrument, and without any consideration and
urther without any transfer on the books, there
an be a devolution of the title, legal or equitable,
f national bank stock, where the evidence thereon
s merely oral and that of conflicting witnesses,
vould be a dangerous precedent and would go far
o nullify the very purpose of the national bank-
ng act. Such a transaction as this would be cer-
ainly in conflict with the express purpose of these
cts. To uphold such a transaction would be to
eave the title to the national bank stock dependent
pon oral testimony or tradition and would be too
ar a dangerous precedent to establish. In the
resent case the defendant claims title by virtue
f these facts and the Court has so decided. Sup-
ose, however, these same facts existed and that
he ownership of these shares of stock would have
ntailed a great responsibility. Suppose that the
ank had been insolvent. In such case, a receiver
f the bank, in order to charge Andrew J. Davis,
r., with the responsibility, would have to rely
pon this same oral testimony and we would doubt-
ess have the spectacle of the defendant, Andrew
. Davis, Jr., denying his ownership of the stock,
aiming that this evidence was insufficient under
he national banking act to make him responsible
s a stockholder and urging that the title re-
ained in decedent.

It would be against the policy of the laws to up-
old such a transaction as the present one. It
ould give a weapon to fraud and would make it

easy to evade the responsibilities fixed by the statute.

No case has gone so far as has the present one. In all cases where this Court has held that an equitable title might pass, although there was no transfer on the books, it appeared either that there were no by-laws of the bank such as we have shown in the present case, or that the stock had been indorsed by written power of attorney or in blank or by some other written instrument and in all cases that the transaction was a sale or pledge for value.

The distinction is manifest if we examine the case of *Johnson vs. Laflin*, 103 U. S., 800. That was the case of a sale for value. A blank power of attorney had been signed. There were no by-laws of the association regulating the method of transfer. The Supreme Court, Mr. Justice Field writing the opinion, evidently intended to limit the application of that case to the precise facts and circumstances shown in the record there, for the Court says:

> "But as between the parties to a *sale* it is enough that the certificate is *delivered with authority to the purchaser or anyone he may name to transfer it on the* books of the company and the price is paid."

This decision is applicable only in case of a sale for value, not with respect to a gift *causa mortis* without consideration. This decision is applicable only where stock is delivered upon a sale for value, where a written power of attorney is endorsed by the seller. This case is only applicable where there are no by-laws of the bank regulating modes of transfer.

Mr. Justice Field in the case last cited also stated that the whole case would be changed if the

sale had not been made in good faith and had been made to evade just responsibility as a stockholder or was a fraud on the creditors of the bank. This shows that the United States statutes will be strictly construed against a transferee who cannot show the transaction to be for value or evidenced by some written assignment, at least something more than oral testimony.

In examining other cases where title was held to pass the same distinctions will be observed as are manifest in the case of *Johnston vs. Laflin.*

In *Black vs. Zacherie*, 3 How., 483, there was a written assignment of the shares and it was the case of a sale for value.

In *Bank vs. Lanier*, 11 Wall., 369, 378, there was a written assignment and power of attorney and a purchase for value.

In this case, furthermore, the transfer had been made on the books to a person who did not produce and surrender the certificate and it was held that the bank was bound to transfer to one who both produced the certificate and also a power of attorney authorizing the transfer of the stock.

In the *National Bank vs. Watsontown Bank*, 105 U. S., 217, there was no by-law regulating the transfer of stock and a written assignment of the stock had been endorsed on the certificates.

In *Continental National Bank vs. Eliot National Bank*, 7 Fed. Rep., 369, there was a pledge for value, a written endorsement of the certificates. The Court said: "Possession with a power to transfer is *prima facie* evidence of title." And the Court considered the giving of value for the transfer as an important feature.

In *Scott vs. Pequonnock National Bank*, 15 Fed. Rep., 494, there was no by-law of the bank regulating transfer of shares and they were delivered with a written power of attorney endorsed in blank and the assignment was for value.

We are not aware of any other cases which have been before United States Courts bearing on this subject and the ones which we have cited above are entirely different from the case at bar. No case has gone so far as to hold that where a bank has a by-law regulating the transfer of stock, where the certificates contain a notice that the stock is transferable only on the books of the bank, a stockholder, by mere delivery of the certificates, without consideration and as a mere gift, can divest himself of title or can confer title where not only there is no transfer on the books but also there is no written indorsement or power of attorney either on the certificate or otherwise. This is the question which we ask this Court to pass upon and under this point we submit that this is a federal question which could and did arise.

When text writers are consulted, it is apparent that the necessity of an indorsement or something equivalent is considered vital.

In *Morse on Banks & Banking*, Vol. 2, Sec. 713, it is stated:

> "The weight of authority is that a transfer of a certificate of stock *with an irrevocable power of attorney* gives *prima facie* title and renders the stock transferable by delivery of the certificate, and when any party in whose hands the certificate is found is shown to be a holder *for value* without notice of intervening equities, his title cannot be impeached and is not affected by a provision in the charter or by-laws making the stock transferable only on the books of the corporation."

Emphasis is put on the giving of the power of attorney irrevocable and the sale for value. The Section continues:

> "Delivery of the certificate *with an irrevocable power of attorney* to have the transfer made on the books transfers the equitable title."

In *Gould & Tucker's Notes* to Section 5139 U. S. R. S., it is stated:

> "Title passes by the delivery and execution of a power of attorney to transfer it" as between the parties.

In *Ames on Notes & Bills*, page 784, the writer, in speaking of certificates *indorsed* with power of attorney, says:

> "*Such* a transfer * * * passes the equitable interest coupled with an irrevocable power of attorney to acquire the legal title."

When the cases cited by the defendant in error are considered, they likewise are not in point. In *Nicollet National Bank v. City Bank*, 38 Minn., 85, the transaction was for value, and there was a written assignment of the stock.

In Bank of Utica, v. Smalley, 2 Cow., 777, 778, in *Gilbert v. Manchester Co.*, 11 Wend., 627, and in *Commercial Bank v. Kortright*, 22 Wend., 348, the stock itself had been indorsed although there had been no transfer on the books.

The same circumstances appear in *Quiner v. Marblehead Co.*, 10 Mass., 476, and in *Sergeant v. Franklin Co.*, 8 Pick., 90.

From a consideration of the foregoing statutes and authorities, it is evident not only that the present case is a novel one, but also that to uphold the passing of the equitable title under the circum-

stances here disclosed would be directly in the teeth of the statute, and the previous decisions of this Court, and would let down the bars to such an extent as to render useless the provisions of the national banking act passed for the security of the bank and its creditors. To uphold the decision would be to establish a precedent which could be used, not only when a national bank is solvent but also when a national bank is insolvent. Such a precedent would enable the owner of national bank stock to shirk his responsibilities, although there would be no written evidence of any transfer, and although his parting with his stock would be a mere gift. We therefore submit with confidence that the gift of certificates of stock and the deliv ery of them, where nothing further occurs, cannot pass even the equitable title in view of the statutes of the United States regulating the transfer and that such an attempted devolution of title is directly in the teeth of Section 5139, U. S. R. S. It is thus apparent that a Federal question not only could have been raised but was actually raised and did exist in this case.

POINT III.

The decision of the Supreme Court of Montana did not rest upon any other ground than a Federal question which was sufficiently broad to maintain its decree.

We do not controvert the proposition that if a Federal question be raised and decided, even erroneously, and there is some other question in the case sufficiently broad so that the whole case can be decided irrespective of the Federal question, then

this Court will not disturb the judgment of the Court below.

What we maintain, however, in the present case, is that the vital, underlying question is, Did the equitable title pass? And to answer this, it is necessary to determine whether, upon the facts shown in the record and the statutes of the United States above quoted, any title could pass. The theory of a gift *causa mortis* is, after all, nothing but the theory that title to National bank stock could pass by a gift made in the manner described. But if the the statutes of the United States prevent such a gift made in such a manner, the fact that the gift was made is immaterial, for the first pre requisite of the gift is that it shall have been made in a manner not prohibited by, or in opposition to, the paramount authority of the statutes of the United States. The decision that the title of the administrator was bad and the title of the defendant good necessarily involved a decision of the following propositions in the following order:

1. That the title claimed by plaintiff under Section 5139 of the United States was invalid; that this statute was not applicable and that a gift of such stock made as described could be effected notwithstanding such statute.

2. That, assuming that there was no prohibition by the statutes of the United States to the making of such a gift, then a gift had actually been made of the stock sufficient under the rules of the common law defining gifts *causa mortis*

But whether or not Andrew J. Davis, deceased, did make this gift and whether or not he revoked it, and whether or not the facts as testified to by the witnesses existed, all of these matters are. wholly immaterial. The foundation of the decree

below, whether expressly so stated or not, necessarily is that the statutes of the United States do not prohibit a gift of stock without consideration, without indorsement or power of attorney or written transfer or transfer on the books. Erected upon this superstructure is the further finding of the Court that there was a gift *causa mortis* which under the common law was a good one.

In such a case as this, therefore, there can be and there is no other question broad enough upon which the case can be decided irrespective of the Federal question. In the case of *De Saussure v. Gaillard*, 127 U. S., 234, the Court said that if it appeared that the decision of the Federal question "was necessary to the determination of the case and that it was actually decided or that the judgment as rendered *could not have been given without deciding it*," the Court has jurisdiction.

A Federal question cannot be avoided by the evading of a direct decision. In *Chapman v. Goodnow*, 123 U. S., 548, the Court said:

> "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Sec. 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

In *Murdock v. Memphis*, 20 Wall., 636, it is held that where a Federal question is raised, the Court must consider it and cannot dismiss the writ; that if the Federal question was properly decided the Court will affirm the judgment, but if

the Federal question was erroneously decided, then this Court must proceed as follows:

"6. If it was erroneously decided against plaintiff in error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that Court without regard to the Federal question, then this Court will reverse the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that Court, as the circumstances of the case may require."

In *Minnesota v. Bachelder*, 1 Wall., 109, it appears that the judgment below was reversed on a Federal question, although the lower Court disposed of the case generally on other grounds, but the Federal question was an underlying one.

There cannot be any doubt that the administrator below claimed title under Section 5139 of the Revised Statutes of the United States, and the decision was specifically against the title he so claimed. The judgment was affirmed, the Federal question was considered by the Supreme Court of Montana. True, they said that in their opinion the main point was the question of the gift *causa mortis* but the fact that they so stated is immaterial. Their decision necessarily involved a

denial of this Federal right, this underlying question. Where title is claimed under the constitution or laws of the United States, and the decision is against that title and the question is an underlying one, this Court will reverse if the decision be erroneous and in no case will dismiss. *Williams v. Norris*, 12 Wheat., 117. The existence of the Federal question gives this Court jurisdiction, and when jurisdiction is acquired this Court will go into the whole matter irrespective of the question whether local law is involved or not.

In *Stanley v. Schwalby*, 162 U. S., 255, this Court, speaking by Mr. Justice Gray, clearly laid down the rule showing the extent to which this Court will review a judgment where a Federal question was raised. He said,—

> "But, so far as the judgment of the State Court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this Court, whether that question depends upon the Constitution, laws and treaties of the United States, or upon the local law, or upon principles of general jurisprudence;" citing *Buck v. Colvath*, 3 Wall., 334; *Etheridge v. Sperry*, 139 U. S., 266; *Bock v Perkins*, 139 U. S., 628; and other cases.

It is thus apparent that the Federal question in this case is the underlying one and therefore this Court must retain jurisdiction and determine whether or not it was properly decided.

POINT IV.

The motion to affirm should be likewise denied.

The defendant in error has not shown sufficient

color for his motion to dismiss to give him the right to urge his motion to affirm.

Gay v. Parpart, 101 U. S., 391;
School District v. Hall, 106 U. S., 429;
Whitney v. Cook, 99 U. S., 607;
New Orleans v. Construction Co., 129 U. S., 45.

Furthermore, in any event we submit that the decision below was wrong, and that therefore the Court should reserve the question of the merits until full argument can be had. The matters involved are important and novel.

Should the Court, however, consider the motion to affirm, it will become apparent from what has already been stated that the Supreme Court of Montana erroneously decided the Federal question involved in this case. We deem it unnecessary to repeat the reasons here again in full. The decision below held distinctly and by necessary intendment that the equitable title to National bank stock can be transferred by a mere delivery of the certificates without indorsement or power of attorney or other written instrument, without a transfer on the books, and by a mere gift without consideration; that such a transaction depending upon oral proof would constitute the donee a stockholder in equity and entitle him to a transfer. Such a decision severs the last restraint of Section 5139 of the banking law. The utmost relaxation hitherto allowed by the Courts in this matter of transfer has been to uphold the validity of a sale for value where there is written evidence of indorsement and where there is an irrevocable power of attorney. To go any further than this would be to open the door for fraud and, to make it impossible to adequately or properly secure the bank or its stockholders. The decree below was

in the teeth of the United States statutes and was an adjudication in conflict with the purpose and spirit of the national banking act. It is a dangerous precedent, and, for the reasons stated in the preceding points, erroneous.

For these reasons, the consideration of the merits should be postponed until the whole subject can be more elaboratiug presented to this Court upon an oral argument.

POINT V.

We therefore submit that the motion to dismiss, as well as the motion to affirm, should both be denied.

Respectfully submitted,
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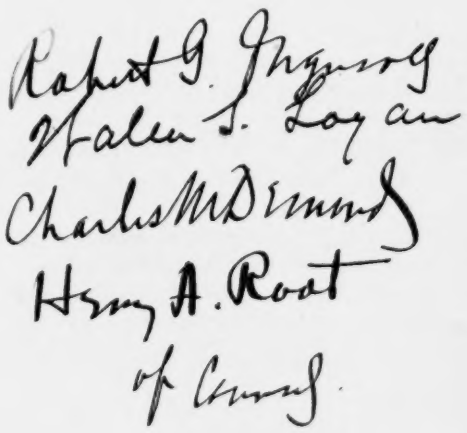

No. 517

Brief of Points for Def'ts in Error

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN H. LEYSON, as Administrator, with the Will Annexed of ANDREW J. DAVIS, Deceased,

Plaintiff in Error,

vs.

ANDREW J. DAVIS, JR., and the FIRST NATIONAL BANK OF BUTTE,

Defendants in Error.

No. 517.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Points and Brief of Edwin W. Toole in Opposition to Motion to Dismiss or Affirm.

H. S. Thurber & Co., Printers, Helena, Mont.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1897.

JOHN H. LEYSON, as Administrator, with the Will Annexed of ANDREW J. DAVIS, Deceased,

Plaintiff in Error,

vs.

ANDREW J. DAVIS, JR., and the FIRST NATIONAL BANK OF BUTTE,

Defendants in Error.

No. 517.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Points and Brief of Edwin W. Toole in Opposition to Motion to Dismiss or Affirm.

The statement of the case as made by the defendants in error, in so far as the same refers to the pleadings, findings and judgment, is substantially correct. It would seem, however, that under the questions raised and presented by the

brief of counsel for defendants in error, an additional statement of facts is proper and necessary.

As bearing upon the question whether a federal question has been raised by the record in any proper or sufficient way, we respectfully submit that the entire record throughout shows this state of facts:

That Andrew J. Davis, the decedent, and the alleged donor, was, at the time of the alleged gift *causa mortis*, the legal and equitable owner of 950 shares of the stock of the defendant bank, and that the same was duly registered in his own name; that the title of the administrator of the said decedent was likewise claimed and held under the National Banking Act of the United States, and that the only title, right, privilege or immunity specially set up or claimed by defendants in error was under a *donatio causa mortis*, and that by this alone it was sought to divest the plaintiff in error of the title thus held by said decedent and by his administrator under said laws of the United States.

And as bearing upon the question of the validity of the alleged gift *causa mortis*, should this court consider a federal question involved and determine at this time the propriety of affirming the judgment, we also respectfully submit that the following facts, which appear upon the record, and about which there is no controversy, are material for the consideration of the court in determining that question:

At the time of the alleged gift *causa mortis* we find that the decedent was a man of good business qualifications and

habits, and that one of his marked characteristics was to do and transact business in a business-like manner, and with such absolute certainty as to leave no matters open for after-contention or controversy; that he was president of the defendant bank, conversant with its by-laws, and frequently called the attention of the directors to them, and had presided over their meetings for a great many years; that by his able business qualifications and prudent business methods he had accumulated a large estate, among which was comprised the defendant bank; that he was apparently apprised of the requirements of the statutes of the United States governing national banking institutions, and conversant with the by-laws of defendant bank; that no transfers of stock could be made, except by the assignment thereof, and transfer upon the books of the bank; he must have known that the dominion, control and possession of the stock remained in the apparent holder upon the stock books, and that to divest himself of the liabilities of a stockholder and rights to the benefits of dividends derivable therefrom, these transfers should be made in the manner prescribed. He was at the time of the alleged gift in the full possession of his mental faculties, and engaged in the transaction of other important business. He was seated at a writing desk with Andrew J. Davis, Jr., and James A. Talbott, afterwards special administrator of the estate, had been appending his name to important documents, and had pen and ink within his reach, and yet it is claimed that a man like this then and there attempted to dispose of this vast fortune without even the scratch of a pen. And that even after

the alleged gift *causa mortis* he was elected president and director of defendant bank, thereby assuming to be the *bona fide* owner of said shares.

We think this additional statement, in the connection at least in which it is proposed to be used, is important under the authorities, which almost universally hold that in a gift of this character the donor should do all that was within his power to do, in order to complete and perfect the gift, and that courts of equity will not do that which the donor could under such circumstances have himself so easily have done.

The entire results in this case, as will be seen from the record, will be determined by the theory adopted by the court. If it is held that in order to divest the plaintiff in error of the title thus held by him under the banking laws of the United States, a gift of the character mentioned would be insufficient, then the questions of fact and findings of the court as to all other matters will be entirely immaterial, and this court would not be called upon in a legal sense to review or re-consider the testimony or findings.

It will also be noted from the record in this case that the legal, equitable and registered title to the stock in controversy rested in the name of the decedent, Andrew J. Davis, and that the only material question involved the transfer of the stock in some lawful manner. So that the question does not involve the investigation of the entire statutes of the United States, nor even of the banking law, but is limited and confined to one particular question.

ARGUMENT.

We will take the propositions in the order in which they are presented by the motion to dismiss or affirm.

I.

Is a federal question raised by the record in any proper or sufficient way?

It is not claimed that the jurisdiction of this Court arises because a national bank is a party hereto, and it is not claimed that the Circuit and District Courts would not have jurisdiction other than such as they would have between individual citizens of the same State, and no jurisdiction is claimed on account of diverse citizenship, nor is it claimed that the pleadings in this case ever were intended to present questions giving the original jurisdiction to the Circuit or District Courts of the United States, but, on the contrary, that this court, by reason of its supervisory jurisdiction could and would determine all questions "where a title, right, privilege or immunity was specially set up or claimed under the Constitution or any treaty or statute or commission held or authorized exercised under the United States." Counsel for defendants cite many cases which would be applicable did the record here present simply the question as to the validity of some statute of a state, or the general proposition as to a statute or decision being contrary to the provisions of the statutes of the United States without clearly designating either. As heretofore suggested, this record discloses that the only question involved was as to the validity of the alleged

causa mortis in divesting the legal, equitable and registered holder of stock under the banking laws of the United States of the title thus held by him. In this view of the case the authority cited by counsel for appellants (Bridge Proprietors vs. Hoboken L. & I. Co., 1 Wallace, 116-143) is directly in point. We submit, without an attempt to analyze the various authorities referred to, that they do not determine the questions presented in this case as does the decision in Bridge Proprietors vs. Hoboken L. & I. Co., supra. Defendants in error make the following quotation on page 17 of their brief: "But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Here it certainly appears that the whole question presented was the claim of the plaintiff in error as a stockholder under the banking act, and the transfer of that stock in the manner claimed to have been made by the *donatio causa mortis*.

In the case referred to, and which we claim is decisive of this question as to the sufficiency of the record, the Court, on page 143, quotes approvingly the six different modes by which this question may be properly presented. "The first of these is 'either by express averment or by necessary intendment in the pleadings in the case.' The sixth is, 'that it must appear from the record that the question was necessarily involved in the decision, and that the state court could not have

given the judgment or decree which they passed, without deciding it.'" The question was presented and the court decided that the title thus held and asserted under the National Banking Act must give way to the alleged gift, notwithstanding the mode of transfer was provided for in the *act*.

It would be useless to argue, from this record, that the Supreme Court did not pass directly upon the question of title claimed by the plaintiff in error in this case under the banking laws of the United States, referring especially to the transfer of its stock and the validity of the *donatio causa mortis*.

This case of Bridge Contractors vs. Hoboken L. and I. Co. is directly in point, and the record supplies every requirement made by it. We do not think that the defendants in error should escape a consideration of the merits of this controversy on account of any defect in the record.

II.

But it is claimed that the decision of the Supreme Court of the State of Montana in this case, which is a very able and exhaustive discussion of the subject from the standpoint taken by it, and from an equitable view of the question as upheld by the States of New York and Connecticut, to which we will hereafter refer, is conclusive of this question, yet we insist that the following propositions will demonstrate that it is for this court to determine what line of policy shall be adopted in the determination of this question. To illustrate: Suppose the

Supreme Court of the State of Montana, in an action instituted by a claimant to a piece of mineral land under the laws of the United States, should support a claim of one opposing such title upon the grounds of *communis error communis just*, in that it had been the common practice in the location of mining claims to neglect some material requirement of the statute. Could it be maintained in this event that a Federal question was not very properly raised? If the Court had decided that the doctrine of *communis error communis just* did not apply, then the decision would stand clearly upon an independent common law proposition, and the party asserting such claim could not be regarded as claiming a title under any law of the United States. But on the contrary, if the doctrine of *communis error communis just* was permitted to prevail under the decision of the court, could it be claimed with propriety that the party asserting his title under the mineral land laws of the United States could not have a review of such decision in this court?

In a case where the statutes of a state are controlling upon some independent proposition, the same doctrine applies. A fair illustration of that is had in a case very recently decided by this Court in which a similar motion to this was made, and which was sustained by the court. We refer to the case of Carothers vs. Mayer, 164 U. S., 325. In that case the Supreme Court of the State of Montana, whether it decided precisely what it intended to or not, did decide that the claim of the appellant, Carothers, could not be maintained under the statutes of limitation of said State for the reason that they had

no application whatever to mining claims held under the laws of the United States. If, however, the court had decided that under the statutes of limitation of the State of Montana, the mining claims so held under the laws of the United States were subject to such statute, and that the said statute applied before the issuance of a patent for the premises, and sustained the claim under the statutes of limitation, could it be said that a Federal question was not involved? As it was, it decided that the statutes of limitation of the State had no application to such cases, and consequently decided it upon an independent proposition involved only in the construction of a State statute. If the Court had held, as suggested, that the statute of limitation prevailed, then we have authority for saying that a party claiming under the laws of the United States would be entitled to a review of this question in this Court as involving a Federal question.

Gibson vs. Choteau, 13 Wall., 99.
Redfield vs. Parks, 132 U. S., 241.

The two propositions heretofore suggested present cases in which the statutes of a state are involved and also the common law doctrines as applied to the interpretation of a United States statute. The only remaining case that can be conceived of would be where some equitable rule or principle is applied, and the provisions of the statutes of the United States made to yield according to the interpretation of equitable principles of the various states of the Union. In this case the plaintiff in error was holding a title and right to

stock in defendant bank under and in pursuance of the provisions of an act of Congress. The mode of transfer and conveyance of this stock is expressly provided for as set out in the record and as quoted in the very able brief of counsel for defendant in error. The Supreme Court of the State of Montana has held that the gift mentioned in the pleadings and referred to throughout the record was an equitable gift that dispensed with the necessity of complying with the require. ments of the act of Congress and of the by-laws of the bank which are expressly recognized by it. If defendants in error were plaintiffs in error in this case there could be no question but that, as their claim was based upon an independent right, no Federal question would be involved; but what we claim is, that, like the class heretofore referred to, when the claimants under the laws of the United States who have thus been divested of their title are appellants in error and asking a review of the principles of equity pleaded, a Federal question is necessarily involved.

These propositions, we believe, comprise the material points involved in this case. It is true that in the discussion of them counsel in the Supreme Court of the State of Montana have argued them from the standpoint that if the claim of the defendants in error under the *donatio causa mortis* failed then it was unnecessary to go further, as there could be no Federal question. But it will be found that a Federal question has been presented throughout the record. It is, therefore, desirable for this court to determine first, whether or not it is for the Federal Courts to establish some uniform doctrine

with reference to the transfers of stock held in pursuance of the National Banking Law, or whether they shall be controlled by the various opinions of the different State Supreme Courts. The Supreme Court of the United States, in Richmond vs. Irons, 121 U. S., 59, in passing upon this question as to the transfer of the stock, being the only question presented by this record, uses this language:

"By section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer." Under this heading the two propositions comprised in the brief of counsel for defendants in error in connection with what has already been said, may be included.

III.

"Could a Federal question properly arise?" and, "Does the decision of the Supreme Court of Montana rest upon other grounds sufficiently broad to maintain the question?" We have discussed these questions to a certain extent necessarily in ascertaining whether they are properly presented by the record. Numerous authorities are cited by counsel to show that a transfer of stock of a corporation, including stocks of a bank, may be made by proper transfers and power of attorney, and the bank thereupon compelled to make the necessary transfers of stock upon its stock books. While the decision of

State Courts with reference to banks—state banks not organized and existing and controlled by the laws of the United States—would be conclusive upon all such questions, we insist that, in so far as national banks are concerned, in the interpretation of the force and effect to be given to statutes, common law principles and equitable doctrines, this Court is the proper tribunal to determine. It will also be noted from the authorities cited, that there are cases where a bank in refusing to make the transfer of the stock has been put in default by the execution of the necessary and proper papers to require a transfer, and that all that was left for the bank to do was to make its objection to the transfer and exercise the discretion given to it. In such cases the discretionary power of the bank was properly invoked, and it would necessarily follow that it should set up some reason for refusing to make it.

But counsel failed to find any authority or decision by this court, so far as we are able to discover, that in a case like this involving the transfer of stock of national banks, that a bank can be said to be in default where the records and pleadings, as in this case, conclusively show that no transfer was ever made of the stock, no power of attorney ever executed authorizing its transfer on the books of the company, and where no opportunity was ever presented to the bank to exercise the discretion reposed in it. The Court will take notice of the fact that in the organization of national banks by the laws of Congress, not only the protection of owners of stock of the bank was intended to be preserved, but all

depositors and persons dealing with the bank, as well as the rights of stockholders, involve a question of public policy, and we think it may fairly be said that the discretionary power, if it exists at all in the directors of the bank in permitting or allowing a transfer of this stock, has never been invoked, and that this Court, exercising its Federal jurisdiction, must determine whether or not there was a valid transfer of the stock in question so as to substitute the alleged donee to the liabilities and benefits of the alleged donor.

As bearing upon the question of the jurisdiction of this Court, counsel for defendants in error have cited cases in which the transfer of legal and equitable rights in patent rights or inventions have been involved. It will be noted in those cases that the statutes of the United States have not assumed to provide any means by which a transfer of those rights shall be made, nor have they assumed to define the result effected by such transfer. The consequence is that those cases can have no application to this for the reason that the statutes of the United States have assumed to define the manner in which transfers of holders of stock in pursuance of the laws creating the rights thereto may be transferred, as well as the result of such transfer.

Counsel for defendants in error seem to rely almost entirely upon the cases of Mechanics' Bank vs. Seton, 1 Pet., 299–304, and Johnston vs. Laflin, 103 U. S., 804, as precedents establishing the doctrine that the equitable rights of defendants in error might be enforced

under the conditions that exist in this case. In both of the cases referred to it will be found that all the requirements of the statutes of the United States, including the by-laws of the bank (made a part of such statute, so to speak), were fully complied with, and that the bank was placed in a situation where it was required to show some reason, or at least exercise its discretion in refusing to make the transfer. In this case, as we have heretofore suggested, no such conditions exist. We claim that this case differs materially from any of the cases cited by counsel for defendants in error, in that the stock of the bank is held and owned by plaintiff in error in pursuance of the provisions of the statutes of the United States, which expressly provide for the mode of its transfer, and that if any common law principle, statutory provision of any of the states, or equitable construction is to be placed upon it, it becomes one which may be exercised by the Federal Court when that jurisdiction is properly invoked.

IV.

Upon the questions as to the affirmance of this judgment, it does not seem proper to incumber this motion with the numerous authorities that adhere to the doctrine that this *donatio causa mortis* was insufficient to invest the donee with either the legal or equitable title to the property. The brief to which counsel for defendants in error refer, which was prepared by the author of this, cites numerous authorities to the effect that a pretended gift like this is ineffectual for any purpose, and that courts of equity will never carry out and do for the

alleged donor that which he had it in his power at the very time to do. We have recited the facts of this gift which show conclusively that the alleged donor was in a situation to have made all the necessary transfers to have put the bank in default, and, under many decisions, a transfer to the donee would have been required. Only two states, so far as we have been able to ascertain, have upheld the doctrine necessary to be supported by the donee in this case. Although it is true that writers have followed it, yet it rests only upon the decisions of the courts of the states of New York and Connecticut. In the State of Connecticut the decisions sustaining such a gift have been much regretted, and in Walsh vs. Sexton, 55 Barbour, 256, Peckham, Judge, says: "I concur in the views expressed in Brown vs. Brown (18 Conn. Rep., 410), against both the principle and policy of sustaining such a gift. But the authorities are the other way. In my judgment, this doctrine is fraught with the greatest dangers. It leads into temptation, from which we all pray to be delivered, and it greatly facilitates frauds. The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it."

It will, therefore, be seen that even in the states of New York and Connecticut the doctrine is entirely unsatisfactory, and, if is a matter properly for Federal cognizance, it should be passed upon by the Federal Courts and some uniform rule adopted with reference to it.

In support of the doctrine that equity will not aid such an alleged gift as this, and that in gifts *causa mortis*, notwith-

standing the consanguinity that may exist, the donee is treated as a volunteer, we cite:

Doran vs. Doran, 33 Pac. R., 929-930.
Holmes vs. Roper, 141 N. Y., 64.
Harris vs. Clarke, 3 N. Y., 93.

The alleged donee, having at his command pen and ink, could have made such a transfer and executed such power to the alleged donee as would have required the bank to make the transfer, or exercise its discretion in showing reasons for not so doing. Equity will not aid in creating or in establishing a trust in gifts.

Overton vs. Sawyer, 7 Jones Law, 6.
Crawford's Appeal, 51 Pa. St., 52.
Bailey vs. Bancroft, 4 Rush, 345.
Glass vs. Burt, 8 Ontario, 391.
Smith vs. Dorsey, 38 Ind., 451.
Houghton vs. Houghton, 34 Hunn, 212.
Brownlee vs. Fenwick, 103 Mo., 120.
Andrew vs. Scott, 94 Mo., 637; and especially,
Gano vs. Fisk, 43 Ohio St., 462.

We also call the especial attention of the Court to the particular conditions upon which the alleged gift was made which renders it invalid under the authorities.

Basket vs. Hassell, 107 U. S., 602.
Comer vs. Comer, 120 Ill., 420.
Eline vs. Jones, 111 Ill., 563.
Walter vs. Ford, 74 Mo., 195.

We think these decisions establish the fact that if the gift does not take effect as an executed and completed transfer to the donee, either legal or equitable, during the life of the donor, it is a testamentary disposition, and could only have been made by a valid will.

See also McCord vs. McCord, *supra*, and
Walsh's Appeal, 122 Pa. St., 177.

Numerous authorities might be cited in addition to these to the effect that the court will not aid an imperfect gift like this.

We respectfully submit that the case is properly before the Court, and that a judgment of affirmance without a proper review of the authorities would be scarcely proper.

Edwin W. Toole.
~~EDWIN W. TOOLE,~~

Of Counsel for Plaintiff in Error.